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OPINION NUMBER 97-1

DATE: January 14, 1997

SUBJECT: Referendum of Ordinance No. O-18365

REQUESTED BY: The Honorable Mayor, City Council, and City Clerk

PREPARED BY: City Attorney

INTRODUCTION

By memorandum dated December 31, 1996, the City Clerk requested our advice regarding certain issues raised in a letter sent to him by the San Diego International Sports Council ("Sports Council") concerning the effort to referend Ordinance No. O-18365. That letter is enclosed as Attachment 1. Several other issues, however, are raised by the referendum attempt, and we address them in this Opinion so the Mayor and Council can be fully informed as to the implications of these issues.

In addressing these issues, we are very mindful that the right of the electorate to referend legislative acts is to be jealously guarded and liberally construed. However, the San Diego City Charter, which reserves to the people the right of referendum, requires the City Council to adopt procedures for the exercise of that right, and the San Diego Municipal Code sets forth those procedures. As more fully explained below, those procedures are material to ensuring the integrity of the referendum process, and the courts have consistently held that such procedures may not be disregarded. Indeed, the purposes served by these procedures are important to safeguard the interests of all voters, including those who sign a petition.

The law is clear that the Municipal Code assigns to the City Clerk, and not to this Office or the Mayor and City Council, the duty to certify the sufficiency or insufficiency of the referendum petitions. The law is also clear that the Mayor and City Council are the decision makers on all matters coming before them. The City Attorney, pursuant to Charter section 40, is

required to provide legal advice to the City Clerk and City Council. With these principles in mind, we turn to the issues raised in this matter.[1]

QUESTIONS PRESENTED

1. In order for the referendary petitions in this case to be valid, did documents referenced in the act sought to be referended, which fully set forth the nature of the act undertaken by the City Council, and which were on file with the act at the time of its adoption, have to be attached to the referendary petition at the time voters were asked to sign it?

2. What is required by San Diego Municipal Code section 27.2610 where it provides: "The date of execution must also be indicated by voters[;]" and should signatures on the petitions herein that lack a date of execution by the voter be counted?

3. What is required by San Diego Municipal Code section 27.2608 where it provides that each referendary petition contain an Affidavit of Authenticity, signed by a voter and which requires that voter to swear, in part: "I am a registered voter of the City of San Diego . . . [;]" and are petitions that contain an Affidavit of Authenticity sworn by a person who is not legitimately registered at the time signatures are gathered valid?

4. If the City Clerk certifies the sufficiency of the petitions, what is the scope of the referendum?

5. If the City Clerk does not certify the petitions as sufficient, what power does the City Council have to either reconsider its action on the Ordinance or submit the matter to the electorate for a vote?

6. If the City Clerk certifies the sufficiency of the petitions, may that decision be challenged by the City Council or other interested party?

7. What liabilities to the City may arise if the Ordinance is rescinded, either pursuant to a qualified referendum or a voluntary act by the City Council to have the electorate vote on the matter?

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[1]As explained, this memorandum addresses a number of issues, not just those raised by the Sports Council. There may be other issues and questions raised about the referendum effort, including whether the amendments to the contract with the Chargers would even be determined by a court to be a referendable "legislative act," and our expression of opinion herein is not to be construed as an acknowledgment or suggestion that no other issues or questions exist.

SHORT ANSWERS

1. In the present case, documents referenced in the act sought to be referended, which fully set forth the nature of the act undertaken by the City Council, and which were on file with the act at the time of its adoption, should have been attached to the referendary petitions at the time voters were asked to sign them; they were not. The requirements of Municipal Code section 27.2605 and binding California case law make it likely a court would find the petitions in the instant case invalid.

2. San Diego Municipal Code section 27.2610 requires each voter who signs a referendary petition to indicate the date of execution. If the City Clerk determines that the signature is either not dated, or has not been dated by the signatory voter, California law holds that such a signature is invalid.

3. San Diego Municipal Code section 27.2608 requires that the voter who signs the Affidavit of Authenticity swear that the voter is a registered voter which, pursuant to California law, means that he or she is "domiciled" in the City of San Diego, and that he or she has duly "registered" with the County Registrar of Voters, at the time his or her signature is placed on the petition. If the petitions filed herein are facially proper, the City Clerk may not use extrinsic evidence to invalidate signatures which on their face appear valid. However, if it can be determined from the face of the petitions that a voter's signature was not properly gathered, the clerk may not use extrinsic evidence to validate that signature and it must not be counted.

4. If a court determined that Ordinance No. O-18365 is a referendable legislative act, the scope of the referendum would only be whether the City should adopt Ordinance No. O-18365. The legal effect of not adopting the Ordinance should be determined by the courts after a lawful public vote and only if the Ordinance is not adopted by the voters.

5. If the petitions are not certified, the City Council may still voluntarily place the matter before the electorate for a binding vote as an initiative, pursuant to Municipal Code section 27.2501. The City Council may also place the matter before the electorate as an advisory vote. Finally, the City Council may itself reconsider the Ordinance. All these actions have legal implications, as set forth in response to Question No. 6.

6. The City Clerk's determination of the sufficiency of the petitions may be challenged in court by the City Council or any interested party, either on the basis that there are insufficient valid signatures or that the petitions are not in proper form, or on the basis that the Ordinance is either not a referendable legislative act or impairs valid contracts.

7. The City faces potential liabilities from a number of sources depending on the action it takes on the referendum. These liabilities are most acute if the City takes a voluntary action to place any or all of the agreement with the Chargers before the voters, and the City's

credit rating may suffer accordingly. The City is best protected if a referendum is legally mandated, but may still face liability and significant consequences to its credit rating.

BACKGROUND

On May 30, 1995, the City Council adopted Ordinance No. O-18182, by which it approved a comprehensive set of agreements between the City of San Diego ("City") and the San Diego Chargers ("Chargers"). Among other things, these agreements (hereafter collectively referred to as "the 1995 Agreement") provided for an extension of the term of the Chargers' occupancy of the Stadium, additional revenue to the City, and several improvements to San Diego Jack Murphy Stadium ("Stadium"). The 1995 Agreement also provided that the City would not be required to expend more than $60 million to construct the proposed improvements ("Improvements"). The 1995 Agreement was neither referended nor subject to a validation action[2] and it is thus conclusively presumed valid.

To accomplish the construction of the Improvements, the City entered into various agreements with the Public Facilities Financing Authority of the City of San Diego ("PFFA") whereby the City would lease the Stadium to PFFA, PFFA would issue bonds to finance the Improvements and contract for the construction of the Improvements, and PFFA would lease the Stadium back to the City for a rent sufficient to pay the debt service on the bonds. The various actions by the City Council and PFFA necessary to accomplish these ends were undertaken in 1996.[3] None of these actions were subject to a referendum or a validation action.

The City was thereafter engaged in validation proceedings with certain individuals, including Bruce Henderson, a proponent of the present referendum effort, who challenged the validity of the financing mechanism and PFFA. The City prevailed in court on all issues, and it has now been conclusively determined that the financing mechanism is valid and that PFFA is a valid, independent legal entity.

The effect of the litigation, however, was to activate the "force majeure" provision of the 1995 Agreement which relieved the City and the Chargers of certain obligations under the 1995 Agreement until such time as the litigation was resolved, which was not until November of 1996. This meant that the City was under no obligation to transmit the plans and specifications for the Stadium expansion to the Chargers for review, and the Chargers were under no obligation to

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[2]Pursuant to California Code of Civil Procedure sections 860 - 870, any public entity or interested person may file a lawsuit to determine the validity of public contracts. Such actions must be brought within 60 days of the contract's authorization, and if no such action is brought, the contract is conclusively presumed to be valid.

[3]Specifically, the lease/leaseback agreements were entered into, and PFFA authorized the issuance of the bonds, in January of 1996. The award of the construction contract by PFFA to Nielsen/Dillingham was authorized by PFFA in December of 1996.

consider giving their concurrence to those plans, until that time. In addition, the delay engendered by the litigation had the unfortunate effect of causing the cost of the project to increase (due to the compression of the construction schedule and inflation). Also, the Chargers requested the City to consider additional improvements above the originally estimated $60 million cost. Ultimately, the City and the Chargers agreed to certain additional improvements that would cause the cost of the project to exceed $60 million.

As a result of all the foregoing circumstances, the City and the Chargers negotiated certain amendments to the 1995 Agreement, among other things revising various dates for the accomplishment of certain actions and raising the ceiling of the City's contractual obligation to $78 million. These amendments (hereafter the "Chargers Amendments") were approved by the City Council by Ordinance No. O-18365, adopted on December 10, 1996 (hereafter the "Ordinance"). This Ordinance, a copy of which is enclosed with this Opinion as Attachment 2, in relevant part recites only that the Council authorizes the City Manager to enter into the various agreements comprising the Chargers Amendments. The Ordinance does not itself describe in any manner the nature or extent of the Chargers Amendments. The form of these agreements were on file in the Office of the City Clerk, along with the Ordinance, at the time the Ordinance was first introduced and subsequently adopted. We are informed that a representative of the proponents of the referendum picked up copies of these documents prior to the adoption of the Ordinance.

On December 12, 1996, certain individuals, including Bruce Henderson and Jerry Mailhot, announced their intention to circulate a petition to referend the Ordinance. Thereafter, they published in *The Reader* a copy of the referendary petition, along with text purporting to explain the nature and scope of the act to be referended. (Copies of the two *Reader*-published petitions are enclosed as Attachments 3 and 4). Apparently, the proponents circulated two versions of the petition, one without a space indicated for the date of each signature (Attachment 5) and one which included such a space (Attachment 6). As can be seen in the Attachments, the petition only recited the text of the Ordinance, and did not include the text of the Chargers Amendments. On December 27, 1996, the proponents submitted petitions which they represented contained 50,134 signatures. Subsequently they have submitted additional petitions. We are informed that none of the petitions submitted included any attachments to the petitions themselves.

On December 30, 1996, the Sports Council sent a letter to the City Clerk, with a copy to this office, indicating its belief that certain improprieties existed concerning the form and content of the petitions, and raising questions regarding the signature gathering process (Attachment 1). The City Clerk has asked for advice on the issues raised in the letter. Subsequently, by letter dated January 2, 1997, Mr. Robert Ottilie, on behalf of the proponents of the referendum, replied to the points raised by the Sports Council. A copy of that letter is enclosed as Attachment 7.

ANALYSIS

I

GENERAL REQUIREMENTS FOR REFERENDARY PETITIONS

Under the California Constitution, charter cities have the right to provide for the manner and procedure in which the referendum power may be exercised. Ley v. Dominguez, 212 Cal. 587 (1931); Whitmore v. Carr, 2 Cal. App. 2d 590, 592 (1934). In Ley, the Los Angeles city clerk refused to certify certain petition signatures on the grounds that they did not comply with several state law requirements. 212 Cal. at 589-592. The California Supreme Court examined each of the purported deficiencies, however, under the provisions of the Los Angeles city charter, on the basis that the relevant provisions of the city charter prevailed over similar provisions in state law and should be applied. Because the signatures complied with each of the city charter provisions, the Court ruled that the signatures were valid and should be certified. Id. Ley thus stands for the proposition that a charter city's provisions regarding the manner and procedures for exercising the power of referendum prevail and must be followed.

San Diego City Charter section 23 reserves to the electorate the right of referendum but also mandates that the City Council adopt procedures for the exercise of that right. These procedures are contained in Sections 27.2601 - 27.2620 of the San Diego Municipal Code. Section 27.2601 provides: "Any legislative act, [with certain limited exceptions], shall be subject to the referendum." Section 27.2605 provides, in relevant part: "A referendary petition shall set forth the questioned legislative act in full . . . ." Section 27.2607 requires that "[t]he signature sheets for voters shall be in the following form . . . ," and then contains a sample form which sets forth a space for the signature of the voter, a space for the residence of the voter, and a space for the date of signature.

Section 27.2608 requires that each petition have an Affidavit of Authenticity which requires a voter to swear under oath, in relevant part, that he or she is a registered voter of the City and that all sheets constituting the petition were fastened together at the time the signatures were executed. Section 27.2610 requires that signatures be executed by voters in their own handwriting, that voters indicate their place of residence, and that "[t]he date of execution must also be indicated by voters."

Sections 27.2612 and 27.2613 require the City Clerk to verify whether or not the requisite number of valid signatures are present and if the petitions are in "proper form."[4] Once referendary petitions were filed, with a sufficient number of facially valid signatures, the Ordinance's effectiveness was suspended.[5] Municipal Code § 27.2604. Thus the Chargers Amendments have

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[4]We understand that the City Clerk has requested the assistance of the County Registrar of Voters in verifying the registration of the signatory voters rather than undertaking that responsibility directly. This would seem entirely appropriate as the Registrar is the County Election Official and keeps the records of registration. The City Clerk still has the responsibility of certifying the sufficiency of the signatures.

[5]Adopted on December 10, 1996, the Ordinance was to be effective 30 days thereafter, or January 9, 1997.

never become effective. If the Clerk verifies either that the petitions are insufficient as to the required number of signatures or as to form, the Clerk is required to issue a Notice of Insufficiency to the proponents of the referendum. Municipal Code § 27.2613. If the Clerk verifies the sufficiency of the petitions both as to the required number of signatures and as to form he is required to send a Notice of Sufficiency to the proponents, and present the certified petitions to the City Council. Municipal Code § 27.2612. Within ten (10) days of presentation, the City Council must reconsider the Ordinance. Municipal Code § 27.2615. The Council must either rescind the Ordinance or submit it to the electorate for a vote within eleven (11) months of the date the petitions were presented to the Council.

II

IN ORDER TO BE VALID, EACH OF THE REFERENDARY PETITIONS HEREIN SHOULD HAVE HAD ATTACHED TO THEM, AT THE TIME THE SIGNATURES WERE GATHERED, ALL OF THE DOCUMENTS REFERENCED IN THE QUESTIONED ACT WHICH FULLY EXPLAIN THE NATURE OF THE ACT

A referendary petition must accurately and fully advise the prospective signer of the nature and substance of the act to be referended, the purpose of this requirement being "to reduce confusion as to the contents of referendum petitions and to promote the full enlightenment of prospective signers of the substantive provisions of a challenged ordinance." Nelson v. Carlson, 17 Cal. App. 4th 732, 738 (1993). As set forth above, the Municipal Code implements this requirement by mandating that the referendary petition set forth the questioned act "in full" and that a voter sign the Affidavit of Authenticity swearing that "all sheets constituting [the petition] were fastened together" at the time the signatures were gathered.

As discussed above, Sections 27.2612 and 27.2613 of the Municipal Code require the City Clerk to review the petitions and determine, among other things, whether they are "in proper form." This duty of the City Clerk is ministerial, in that the Clerk must determine the sufficiency of the petitions and, if the Clerk finds that the petitions are "in proper form" and are otherwise qualified (i.e. if there are sufficient valid signatures), he must certify the petitions as valid. If he finds them not to be "in proper form," he must reject the petitions as insufficient. Myers v. Patterson, 196 Cal. App. 3d 130, 136 (1987); Billig v. Voges, 223 Cal. App. 3d 962, 968-969 (1990). The Clerk, however, must exercise his discretion to make the determination as to the "form" of the petitions.

Some technical defects as to form may be excused if the petitions substantially comply with the requirements. Technical requirements designed to provide information to prospective signers, however, may not be excused. Strict, rather than substantial, compliance with those requirements is generally required, and a failure to strictly comply with information-based requirements may require invalidation of a petition. Ibarra v. City of Carson, 214 Cal. App. 3d

90, 99 (1989).[6] The doctrine of liberal construction should not be used to weaken important requirements designed to give information to the voters. Id., citing Myers v. Patterson.

In Myers, the requirement at issue was that the published notice of intention appear within the petition itself. Petitions were circulated which did not contain this notice, and the city's registrar of voters[7] rejected the petitions as invalid. Recognizing that the court's policy is generally to construe statutory and charter provisions in favor of the exercise of the initiative and referendum power, the court nonetheless ruled that the city registrar had a duty to reject the petitions, because the defect "directly affected the content of the petition sections circulated to voters." 196 Cal. App. 3d at 137. In so finding, the court contrasted its situation with that in Truman v. Royer, 189 Cal. App. 2d 240 (1961) by noting that in Truman, the defect was not in a part of the petition itself, nor did it include information that would be important to the voters signing the petition. As such, the clerk in Truman was free to disregard the defect. Id. By contrast, in Myers the defect constituted a failure to provide such information, and thus could not be disregarded or waived by the city registrar. Id.

In Billig, the defect was the failure to include in a referendum petition one section of the challenged ordinance and two exhibits which comprised "the major portion of the ordinance." 223 Cal. App. 3d at 964. Again, on the grounds that the failure to include these items constituted a failure to include the "text" of the ordinance, the court held that "the [clerk] had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of [Elections Code] section 4052."[8] Id. at 968.

In the instant situation, the question is whether the language of the Ordinance alone provides the information that would fulfill the requirement to fully inform signers of the petitions or whether, to satisfy this requirement and inform the voters of the nature of the act to be referended, the petitions, when circulated and signed by the voters, must have had attached to them the form of the Chargers Amendments that are the subject of the Ordinance. The Sports Council's letter asserts that the petitions are defective because they fail to include or attach the text of the Chargers Amendments, and that as such they do not include the "full text" of the challenged act, as required by Municipal Code section 27.2605. What is meant by "full text," and

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[6]But see Hayward Area Planning Association v. Superior Court, 218 Cal. App. 3d 53, 59 (1990), in which a failure to provide a title, as required by the California Elections Code, did not invalidate the petitions. The court found that defect did not deprive voters of essential information because the text of the petitions provided the same information as would have been provided by the title.

[7]In Myers it was the city registrar of voters who was charged with the duties which the City of San Diego devolves upon the City Clerk.

[8]California Elections Code section 4052, recently re-designated as Section 9238, requires that the text of the ordinance which is subject to the referendum be included in the petition, and is effectively the same as Municipal Code section 27.2605.

its relative importance to the referendum process, has been litigated in the context of former California Elections Code section 4052. These cases, including Myers, Ibarra, Billig, as well as the cases discussed below, should provide some guidance to the City Clerk in making his determination as to whether the instant petitions comply with the requirements of the Municipal Code, and further whether or not he has a duty to accept or reject the petitions.

In Creighton v. Reviczky, 171 Cal. App. 3d 1225 (1985), the Court of Appeal declined to order the certification of a referendum petition that failed to include the entire text of the challenged ordinance. Relying on the California Supreme Court in Clark v. Jordan, 7 Cal. 2d 248 (1936), the Creighton court stated:

> While we are of the opinion that statutes dealing with the initiative[9] should be liberally construed to permit the exercise by the electors of this most important privilege, we are also of the opinion that statutes passed for the purpose of protecting electors from confusing or misleading situations should be enforced.
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> . . . .
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> No elector can intelligently exercise his rights under the initiative law without a knowledge of the petition which he is asked to sign, and any legislation which will increase the facilities of the elector to acquire such information is well within the terms of the Constitution . . . .

Creighton, 171 Cal. App. 3d at 1232 (quoting Clark v. Jordan, 7 Cal. 2d at 249-250, 252).

In Chase v. Brooks, 187 Cal. App. 3d 657 (1986), a city council enacted a zoning ordinance reclassifying certain real property described in an attached exhibit. The petition circulated to protest the ordinance failed to attach the exhibit, and the appellate court determined that this failure constituted a violation of the referendum statute. Noting that the statute was "designed to reduce confusion as to the contents of referendum petitions and to promote the full enlightenment of prospective signers of the substantive provisions of a challenged ordinance," the court found that the failure to attach the exhibit describing the exact location of the real property constituted a lack of substantial compliance with the requirements of the referendum statute. Recognizing that the property description might not aid prospective signers in determining the exact location of the property in question, the Court nonetheless found it would improve "the chances prospective signers will not be confused regarding the breadth of the challenged ordinance." Id. at 662-664.

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[9]Although the Clark opinion addresses itself to the initiative power, the citation to this case by Creighton and other referendum cases illustrates that the same analysis pertains to both initiative and referendum cases.

Most recently, in Nelson v. Carlson individuals sought to referend a resolution adopting a general plan and a local coastal use plan amendment that were hundreds of pages in length. The petition was circulated and signatures gathered without attaching the sizable documents that were the subject of the resolution. Based on the failure to attach the documents, the city clerk refused to certify the petitions that were submitted. The individuals sought and obtained an order from the trial court, finding the statutory requirements for a referendum petition had been substantially complied with, and ordering the certification of the petitions.

The Fourth District Court of Appeal reversed, finding that the failure to attach the plans rendered the petitions invalid. In so finding, the court noted that the referendum statute has as its underlying purpose "minimizing the possibility prospective signers may misunderstand the purpose of a petition." 17 Cal. App. 4th at 740. Turning to the documents at issue in that case, the court observed that the plans were the focal point of the resolution, and that without the plans individuals reviewing the petition had no way of informatively evaluating whether to sign it. Even if the documents would not prove very helpful to some voters, due to their length and complexity, the court found that attaching them to the petition would improve the chances that prospective signers would not be confused regarding the breadth of the challenged resolution. Id. at 740.

Here, the Chargers Amendments are the focal point of the Ordinance, yet the substance of the Chargers Amendments cannot be ascertained at all without reading the documents themselves. Circulating the petition without the documents leaves the prospective signer without any way of determining the substance of that which he or she would ask to vote upon. The prospective signer has no way of knowing, from the petition and Ordinance alone, what has been accomplished by passage of the Ordinance.

In the present case, the opportunity for confusion, in the absence of the documents themselves, is real and substantial. As set forth above, the proponents of the referendary petition published it in *The Reader* on December 12 and 19, 1996, with bold headlines declaring that this petition would "help put the $100 million+ [Stadium] project before the public [on the ballot]." "Explanatory" text over the signature lines for Bruce Henderson and Jerry Mailhot stated that the Council "just took on huge financial liabilities extending well into the next century." (See, Attachments 3 and 4).[10] In our opinion, these statements could be misleading. The decision to expand the Stadium was made by the City Council in May of 1995, and the structure of the $60 million financing plan for the expansion project was approved in January of 1996. It is our opinion that nothing in the Ordinance passed on December 10, 1996, substantially alters those

[10]We have also been informed of direct anecdotal evidence regarding statements made by signature gatherers, not dissimilar from the statements made in the advertisement.

prior policy decisions, approvals or commitments.[11] Thus, if the persons circulating the petition echoed such potentially misleading information, for example by saying to prospective signers that it would put the entire Stadium expansion on the ballot, or that it will cost the taxpayers "$100 million+," the absence of the actual documents becomes even more critical, because the petition signers would have no way of knowing whether what they were being told was accurate.

Last year, the City addressed this issue in the San Diego Superior Court, responding to an attempt to referend the financing ordinance for the Convention Center expansion project. In that instance, the persons who would have circulated the petitions sought at the outset court permission to circulate them without the financing documents attached. After substantial briefing and argument, Superior Court Judge Robert O'Neill held that a petition circulated without the financing documents attached would not be valid. Among other things, the judge noted: "If we encourage people to go out and referend every statute that they don't like based on only a small percentage of the available information, could that work public harm? Absolutely. No question about it. The public is notorious for being easily led by sloganeering and superficial arguments." Transcript of Hearing, April 1, 1996, Right to Vote Committee, et al. v. City of San Diego, Superior Court Case No. 698120.

Following the decision in Nelson, Judge O'Neill found that the policy of having an informed electorate, inherent in the referendum statute, required attaching the documents that would inform the potential petition signers of the nature and extent of the measure they would be referending. Judge O'Neill's prescient comments in the Convention Center referendum litigation apply with equal force in this situation, supporting our conclusion that any petition to referend the Ordinance, circulated without the documents comprising the Chargers Amendments attached, is invalid.[12]

In his letter (Attachment 7) Mr. Ottilie contends that, since the Ordinance did not say that the documents were "attached" but were referenced by the indication that they were on file in the

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[11]In fact, the raising of the ceiling on the City's obligation, from $60 million to $78 million, is not inconsistent with the 1995 Agreement. While that 1995 Agreement prohibited the Chargers from requiring the City to spend more than $60 million on the Improvements, nothing in the 1995 Agreement prevented the City from voluntarily choosing to spend more than $60 million. Thus, the raising of the ceiling is properly viewed as a freely negotiated exercise of the City's right to exceed $60 million in the course of improving its own public asset.

[12]The proponents of the referendum may contend that they were unaware of the requirement to attach the documents. We note that Mr. Bob Glaser was intimately involved with, if not the coordinator of, the referendum attempt on the Convention Center. He thus had direct knowledge of the result in that case and the requirement to attach the documents. We are informed that Mr. Glaser is also intimately involved with, if not the coordinator of the referendum attempt here. We thus believe the proponents had direct, if not imputed, knowledge of the attachment requirement. We also were informed that Mr. Glaser requested, and was provided, the form of the agreements on file in the City Clerk's Office at the time the Ordinance was introduced and adopted.

office of the City Clerk, there is no obligation to include them with the petition.[13] Mr. Ottilie goes on to reference a 1989 Superior Court case in which he contends the City took that very position.

In our opinion, Mr. Ottilie's arguments have no merit. Each case must be decided on its own facts. Thus, in 1989, this Office was in the position of defending the action of the City Clerk certifying the sufficiency of the referendum petitions in that matter, and the court determined that the petition signers were not misled by the language of the petitions. In any event, that case is not binding, as are the cases cited above. The San Diego Superior Court and Fourth District Court of Appeal have clearly set forth the legal standard since that 1989 argument by the City Attorney.

Moreover, the Ordinance's references to the Chargers Amendments as being "on file in the Office of the City Clerk," does not vitiate the attachment requirement. The documents were on file at the time the Ordinance was introduced and later adopted, as the City Clerk's stamp clearly shows on the face page of the Chargers Amendments (copies of which are enclosed as Attachment 8). The proponents of the referendum apparently had actual possession of these documents at the beginning of the referendum period, or at least the documents were made available to them. Most importantly, the Ordinance itself does not describe the Chargers Amendments. It should be clear that, for the voters to fully understand the nature and extent of the act undertaken by the City Council, the referenced documents should have been attached to the petitions at the time signatures were gathered.

[13]Mr. Ottilie distinguishes the 1995 Agreement, the ordinance for which (O-18182) Mr. Ottilie claims had the subject documents attached. A review of that ordinance, however, reveals that the documents comprising the 1995 Agreement are referenced in exactly the same manner as here.

III

THE ABSENCE OF A DATE AFFIXED BY THE VOTER WHO SIGNS A REFERENDARY PETITION RENDERS THAT SIGNATURE INVALID AND IT SHOULD NOT BE COUNTED

As discussed above, Municipal Code sections 27.2607 and 27.2610 require that the date of execution must be indicated by the voter on the petition alongside his or her signature and address. The failure to comply with a date requirement is a defect which affects the validity of the petition itself:

> The Attorney General has opined that petitions should not be invalidated because of irregularities "not affecting the validity of the petition itself." But where, as here, the declarations affirmatively demonstrate they were circulated outside the [120-day] period [set by the Legislature] within which all signatures must be obtained, or where they fail to state they were circulated within the statutory period, then these irregularities affect the validity of the petition itself. If the signatures were not obtained within the [120-day] window period, they may not be counted.

Hartman v. Kenyon, 227 Cal. App. 3d 413, 419 (1991). The Hartman case dealt with a recall petition circulated under the provisions of the California Elections Code (as incorporated into the Santa Cruz city charter), which among other things required collection of the signatures within a 120-day period, and further required the circulators to affirmatively represent the dates within which the signatures were obtained. The petitions submitted did not have the requisite dates, and the city clerk refused to certify them. Based on the finding that this failure affected the validity of the petition itself, the Court ruled that the clerk's actions were proper.

The requirement that the voter be the one to affix the date has similarly been upheld as a legitimate and necessary requirement. In Uhl v. Collins, 217 Cal. 1 (1932), a petitioner claimed that this requirement under state law was unconstitutional. In finding to the contrary, the California Supreme Court ruled that the requirement is:

> [M]aterial to the determination of whether the signer is a registered elector at the time he signs the petition. Such a statute does not violate the constitutional provision, but rather tends to "facilitate its operation," and hence is a proper subject for legislation under article IV, section 1 of the Constitution.

Id. at 5. Eight years later, the Supreme Court reaffirmed this holding, stating: "That the [statutory provisions requiring the voter to affix the date] constitute reasonable legislative regulations in furtherance of and not limitations upon the initiative power reserved in the Constitution is now definitely settled." Thompson v. Kerr, 16 Cal. 2d 130, 131-132 (1940), citing

Uhl v. Collins.[14] Courts in other states have also recognized the essential function performed by this requirement. In Clark v. City of Aurora, 782 P.2d 771 (Colo. 1989), the Colorado Supreme Court upheld a city clerk's refusal to certify the validity of several signatures on a referendum petition, among other reasons because of defects in the dating of the signatures: "Furthermore, the additional requirement that each petition signer designate the date of signing the petition provides confirmation of the fact that the petition was signed on the date explicitly designated by the signer rather than on a date designated by some other signer." Id. at 782.

The Municipal Code's date requirement here fulfills all of the purposes recognized as critical to the referendum process. Without a date, affixed by the petition signer, identifying when the signature was affixed to the petition, it is impossible for the Clerk to ascertain whether this requirement was complied with. See Assembly of the State of California v. Deukmejian, 30 Cal. 3d 638, 647 (1982).

Assembly v. Deukmejian provides an illustrative contrast to the other cases on this issue. In Assembly, the requirement at issue was that the petition circulator affix the dates of signature to the petitions, and the Court was faced with the question of whether pre-printed dates on the petitions would suffice. While noting that this was not the preferred method for confirming the dates for circulation, the Court nevertheless found substantial compliance with the requirement. The requirement was that the circulators affix the dates, and there was no evidence on the face of the petition that the circulators had not placed the dates there, albeit in a pre-printed manner. The requirement was thus substantially complied with (Id. at 653) and the signatures on that petition were not invalidated on that ground.

In the instant situation, the Municipal Code unequivocally requires the voter to indicate the date he or she signed the petition, and does not allow the circulator, or anyone else to so indicate. As the Supreme Court has found, this requirement is not only valid but necessary to preserve the integrity of the referendum process, and because the City has adopted this requirement pursuant to its Charter powers, it must be enforced. "Substantial compliance means *actual* compliance in respect to the substance essential to every reasonable objective of the statute." Id. at 649 (emphasis in original). Any signature, therefore, that is not accompanied by the voter's indication of the date on which he or she signed the petition, cannot be determined by the clerk to have complied with the Municipal Code, and cannot be certified as valid thereunder.

Mr. Ottilie contends generally that the Clerk should make every effort to count signatures and that, if extrinsic evidence exists to indicate the date on which a voter signed the petition, that vote should be counted. He also contends that the circulator, by signing the Affidavit of Authenticity, certifies that the signature was gathered on the date the circulator indicates. On the

[14]Since these California Supreme Court pronouncements, no California court has suggested, much less purported to hold, that this precedent has been abandoned or diminished. It thus remains the law in California today.

latter point, we note that the oath taken in the Affidavit of Authenticity does not include a provision that the circulator certifies that the signatures were gathered on the date indicated by the circulator. Thus, there is no such certification by the circulator.[15] Additionally, however, we do not believe that, if a requirement exists that the voter indicate the date of signing, extrinsic evidence (such as a date affixed by another voter on the same petition) may be used to satisfy the dating requirement. Allowing such evidence to be used would negate the purpose of the requirement, which is to provide "confirmation of the fact that the petition was signed on the date explicitly designated by the signer rather than on a date designated by some other signer." Clark v. City of Aurora, 782 P.2d at 782. Cf. Schaaf v. Beattie, 265 Cal. App. 2d 904, 909 (1968) (extrinsic evidence not allowed to verify registration of signatories).

IV

TO QUALIFY THE SIGNATURE OF A PERSON WHO SIGNS A REFERENDARY PETITION, THAT PERSON MUST BE A QUALIFIED REGISTERED VOTER, MEANING THAT HE OR SHE IS "DOMICILED," AS THAT TERM IS DEFINED IN CALIFORNIA LAW, IN THE CITY OF SAN DIEGO, AND THAT HE OR SHE HAS DULY "REGISTERED" WITH THE COUNTY REGISTRAR OF VOTERS

As previously discussed, Municipal Code sections 27.2609 and 27.2610 provide that signatories to a referendum petition must be qualified registered voters in the City of San Diego. Likewise, the circulator of a referendary petition must be a registered voter in the City. This requirement has been held to be constitutional as fulfilling a compelling state interest in preserving the integrity of the referendum process. Browne v. Russell, 27 Cal. App. 4th 1116, 1125-1127 (1994).

"Voter" is defined in the Municipal Code as a person who is "validly registered to vote." Municipal Code section 27.2003(m). Valid registration, in turn, requires that the person be "domiciled" in the City at the relevant time. Assembly v. Deukmejian, 30 Cal. 3d at 647, citing Cal. Elections Code §§ 300-320. "Domicile" is defined, by Elections Code section 349,[16] as "that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning. At a given time, a person may have only one domicile." Further, "a person does not gain a domicile in any precinct into which he or she comes for temporary purposes merely, without the intention of making that precinct his or her home." Cal. Elections Code § 2021(b); Walters v. Weed, 45 Cal. 3d 1, 6-8

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[15] If there was such a certification, we might be faced with a situation analogous to Assembly, wherein it was appropriate for the circulator to make the verification. The Municipal Code, however, does not allow that option.

[16] The California Elections Code is incorporated into the Municipal Code unless specifically excepted by the Municipal Code or the Charter. Municipal Code section 27.2004. As there is no definition of "domicile" in the Municipal Code, reference to the Elections Code is appropriate.

(1988). Residence alone is insufficient to establish domicile; there must also be the intention to remain in that place of residence. Penn. Mut. Life Ins. Co. v. Fields, 81 F. Supp. 54, 57 (D.C. Cal. 1948).

In Walters, several students had temporarily moved from their college campus, then returned but had yet to establish new residences. They voted in a municipal election based on their former campus residences, whereupon certain citizens sought to invalidate their votes as illegal. Examining the voter residency requirements of the Elections Code and California case law, the Supreme Court held that the students could claim their former residences as their "domicile" until they had established a new one; since they had not yet taken the requisite action to acquire new domiciles, their old domiciles were effective for voting purposes. 45 Cal. 3d at 14.

In Fields, beneficiaries of the estate of actor W. C. Fields attempted to establish that Fields was domiciled in New Jersey, based on his continued retention of a room in his brother's home in that state for a period of years before he came to California. The district court found, however, that Fields had taken substantial steps to evidence an intention to reside permanently in California, including continuously working in California and renting several homes in the Los Angeles area. Fields had also, at various times, stated to others that he intended to take up permanent residence in California. Based on the evidence of Fields' intent, the court found his domicile to be California, not New Jersey. 81 F. Supp. at 58-59.

The Fields opinion establishes the importance of the person's intent in determining his or her domicile. The holding in Walters confirms that until a person acquires a new domicile, that is, until the person abandons one place or residence and moves to another place with the intention to stay there, the old place of residence is that person's "domicile." Hence, if a person has come to the City of San Diego and submitted a voter registration card, without the intention of abandoning his or her old domicile and establishing a new one here, he or she is not domiciled here and may not be a qualified registered voter within the terms of the Municipal Code. Such persons may not validly sign or circulate a referendary petition.

Valid registration can be accomplished at the time the petition is signed. Elections Code section 2102 provides that:

> For purposes of verifying signatures on a recall, initiative or referendum petition . . . a properly executed affidavit of registration shall be deemed effective for verification purposes if both (a) the affidavit is signed on the same date or a date prior to the signing of the petition or paper, and (b) the affidavit is received by the county elections official on or before the date on which the petition or paper is filed.

Thus, a person who executed an affidavit of registration at the same time he or she signed the petition would have, assuming the validity and sufficiency of the affidavits themselves, satisfied the first requirement of Section 2102.

The second requirement, that the affidavits be "received" by the county elections official when the petition is filed, is more complex in the instant situation. Here, the petitions have been filed with the city clerk, who is not the "county elections official." To the extent that any affidavits of registration were submitted to the city clerk, but not to the County Registrar of Voters, an argument can be made that the second requirement of Section 2102 has not been complied with because the petition has been filed without a simultaneous or prior receipt by the county elections official of the affidavits of registration. A contrary argument may be made, however, that by simultaneously submitting the petitions and the affidavits of registration to the city clerk (who thereafter transmitted the petitions and affidavits of registration to the County Registrar) the second requirement of Section 2102 has been substantially complied with. No case law appears to have been developed on this issue. Following the principles in other election law cases discussed in this memorandum, we believe a court would have to determine whether such a lapse in procedural compliance is insignificant or material to the integrity of the voter registration and referendum processes.

These points, however, do not clarify the City Clerk's role in verifying the signatures. In verifying the validity of the signatures, the Clerk's function is not to go beyond what appears on the face of the petition and the voter registration affidavits. Schaaf v. Beattie, 265 Cal. App. 2d at 909. Thus, if there is no deficiency in the registration affidavit, or in the petition information provided by a particular signatory, and if the information he or she provided on the petition and the registration affidavit is the same, the clerk may not use extrinsic evidence to determine whether that information is in fact truthful or accurate. Id. It follows necessarily that any discrepancy which does appear on the face of the registration affidavit or the petition, which would indicate that the signatory is not a qualified registered voter, requires invalidation, as (once again) the clerk is not permitted to consider extrinsic evidence, either to invalidate or to validate a signature. Id. In making this determination, the clerk's duty "is ministerial, but not mechanical." Wheelright v. County of Marin, 2 Cal. 3d 448, 455 (1970). The clerk must use his or her eyesight and other "critical faculties," and exercise judgment as to whether there are discrepancies which would make the signatures invalid. Thereafter, if any discrepancies are so minor as to make the clerk's rejection of a signature arbitrary or unreasonable, the clerk must not reject the signature. Where, however, the discrepancies perceived by the clerk "are not so minor and the similarities are not so great that only one conclusion can be made as to the validity or invalidity of the signature," rejection of the signature as invalid, based on the perceived deficiencies on the face of the petition, is within the proper exercise of the clerk's duties. Id. at 456.

The letter from the Sports Council, which formed the basis for the Clerk's request to this office for advice, suggests that there may be information which would lead to the conclusion that some of the circulators and/or signatories are not in fact qualified registered voters in the City of

San Diego because they do not in fact meet the test of domicile. This is generally a question to be raised and resolved in the context of a voter fraud investigation by the appropriate agency and not by the City Clerk's office. Assembly v. Deukmejian, 30 Cal. 3d at 648. If, however, the Registrar of Voters is able to facially determine that a circulator's registration affidavit was not executed at the time signatures were gathered, the signatures on that petition should not be counted as valid.

Mr. Ottilie, in his letter, makes very general arguments on this point, without citation to relevant authority. In light of our opinion on this matter, we do not feel a need to respond to Mr. Ottilie's position at this time.

V

THE SCOPE OF THE REFERENDUM IS ONLY THE ADOPTION OF ORDINANCE NO. O-18365

City Charter section 23 provides, in relevant part, that "any ordinance" (with limited exceptions) may be referended. Municipal Code Section 27.2601 provides that any "legislative act" (with limited exceptions) may be referended. Thus, the question to be posed to the electorate if the petitions are sufficient, and assuming that Ordinance No. O-18365 is a legislative act, is whether the Ordinance should be adopted by the City of San Diego.

The proponents of the referendum contend that the referendum should put the entire agreement between the City and the Chargers before the electorate, as well as the question of whether the Stadium should be expanded. What the electorate is to decide, however, is only whether the Ordinance should be adopted.[17] This conclusion is based on the language of the Municipal Code sections cited above and of Municipal Code Sections 27.2616 and 27.2617, the latter of which provides that: "If a majority of the voters voting on a legislative act of the Council approve the act, it shall be deemed adopted . . . [emphasis added]," and case law. [cite]. The effect of the rejection of the Ordinance will be determined following the vote, if that is the result.[18]

VI

EVEN IF THE PETITIONS ARE INSUFFICIENT, THE CITY COUNCIL MAY PLACE THE MATTER BEFORE THE ELECTORATE FOR EITHER A BINDING OR ADVISORY VOTE

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[17]By including only the language of the Ordinance in the petitions, the proponents of the referendum have themselves established that this is the only question to be put to the electorate.

[18]The proponents of the referendum may contend that the effect of the vote needs to be determined so that appropriate campaigns may be run on the vote. Courts, however, generally refuse to opine on the interpretation of effects of legislative acts prior to elections.

Municipal Code section 27.2501, dealing with Initiatives, provides that the City Council may submit legislative acts to the electorate for approval without petitions having been filed. In this case, if the petitions are insufficient, the City Council may opt for this method of placing the adoption of Ordinance No. O-18365 before the electorate, provided it is a legislative act. In addition, there is nothing in the Charter, Municipal Code or other law that prohibits the Council from placing the matter before the electorate as an advisory matter, whether or not it is a legislative act. There are implications of doing so, however, as more fully discussed below.

VII

A DECISION BY THE CITY CLERK THAT THE PETITIONS ARE SUFFICIENT MAY BE CHALLENGED IN COURT BY THE CITY COUNCIL OR ANY INTERESTED PARTY

If the City Clerk certifies referendum petitions as sufficient, he must submit them to the City Council for action. Municipal Code § 27.2612. Thereafter, the City Council must meet within ten (10) days to reconsider the act in question, and at that time either repeal the act or adopt a resolution of intention to submit the act to the people at a special election. Municipal Code §§ 27.2615-2616. These duties are ministerial, and the Council is not legally free to simply refuse to take any such action after receiving the petitions from the City Clerk. Farley v. Healey, 67 Cal. 2d 325, 327 (1967); deBottari v. City Council, 171 Cal. App. 3d 1204, 1209 (1985).

If the City Council or any interested party, however, believes that action on the petitions is outside the power of either the Council or electorate to act, or is substantively invalid, a remedy is available. Id. at 1209-1210. In deBottari, the Court of Appeal[19] found that, notwithstanding the Council's improper conduct in refusing to act on the petitions, it was appropriate for the court to review the substance of their assertion as to the invalidity of the referendum. In so doing, the court recognized that there are two (2) limited circumstances where a pre-election review of a referendum item is appropriate; where it is alleged that the electorate does not have the power to adopt the act or where the act is substantively invalid. Id. at 1210. Finding that the referendum[20] would have enacted a substantively invalid ordinance, the court upheld the trial court's refusal to order the measure placed on the ballot. "Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts." Id. at 1213.

Subsequent courts have been equally willing to review, before election, measures that the legislative body asserted were irretrievably improper subjects of the referendum process. In City and County of San Francisco v. Patterson, 202 Cal. App. 3d 95 (1988), the City received a

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[19]The Fourth District Court of Appeal, Division Two.

[20]The referendum in deBottari would have enacted a new zoning ordinance.

certified petition from the city's registrar, placed it on the ballot, then promptly filed a petition for writ of mandate to have the item removed from the ballot on the grounds it was an improper subject of initiative.[21] The trial court ruled in favor of the city, and the Court of Appeal[22] affirmed.

> Courts have repeatedly stressed it is more important to review challenges to initiative measures after an election rather than to disrupt the electoral process by preventing exercise of the people's right to vote. (*Brosnahan v. Eu* (1982) 31 Cal. 3d 1, 4 . . .). An exception to this judicial restraint arises on a showing the proposed initiative is beyond the power of the voters to adopt or is not legislative in character.

202 Cal. App. 3d at 99-100. The court articulated the reasoning behind the propriety of pre-election review thus:

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

Id. at 100, citing American Federation of Labor v. Eu, 36 Cal. 3d 687, 697 (1984), and deBottari, 171 Cal. App. 3d at 1209.

The Fourth District Court of Appeal subsequently confirmed its position on the propriety of pre-election review in Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013 (1991), wherein certain citizens had sought to place on the ballot a proposed ordinance pertaining to homosexuality and AIDS. There was no dispute the initiative had procedurally qualified, but the Riverside City Council refused to place the initiative on the ballot. The citizen proponents filed a petition for writ of mandate, which was denied by the trial court. The Court of Appeal affirmed. 1 Cal. App. 4th at 101.

Perfunctorily acknowledging that the city council lacked the legal authority to refuse to place the measure on the ballot, the court quickly moved on to examine the substance of the city council's contentions as to the measure's illegality. Elaborating on its own decision in deBottari, the Patterson opinion and cases cited therein, the court explained why pre-election review was entirely appropriate:

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[21]California case law uniformly applies the same principles to the powers of initiative and referendum on this issue.

[22]First District Court of Appeal, Division One.

> [I]f an initiative ordinance is invalid, no purpose is served by submitting it to the voters. The costs of an election--and of preparing the ballot materials necessary for each measure--are far from insignificant. [citation] Proponents and opponents of a measure may both expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community. That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure that is for any reason legally invalid.

Id. at 1023. Finding thereafter that the measure in question was both unconstitutional and an invalid attempt to amend the city charter, the court denied the writ of mandate.[23]

In the present case, the referendum proponents have publicly asserted in their lawsuit that their referendum places the entire Chargers transaction, including the contracts entered into in May of 1995, at issue for voter approval. Questions have therefore been raised not only as to the referendability of the measure approving the Chargers Amendments, but also as to the substantive validity and sufficiency of the petition as circulated, the constitutionality of referending a measure pursuant to which contracts have been validly entered into and relied upon, and further as to the integrity of the signature gathering process. If any or all of these questions lead the City Council or an interested party to believe that all or a part of the referendum would be unconstitutional or invalid, their remedy is to seek pre-election review of these concerns by the court through a petition for writ of mandate.

The issue of constitutionality arises to the extent that the proponents seek to referend measures passed by Council in May of 1995 and January of 1996, that would have the effect of impairing contracts in violation of the state and federal constitutions.

Article I, section 10, clause 1 of the Constitution of the United States sets forth certain powers that are prohibited to the states. Among other things, that section provides: "[N]o state shall . . . pass any . . . law impairing the obligation of contracts." Article I, section 9 of the California Constitution provides that: "A . . . law impairing the obligation of contracts may not be passed." This prohibition reaches any form of legislative action, even direct action by the people such as an initiative or referendum. Ruano v. Spellman, 81 Wash. 2d 820, 825 (1973), citing Ross v. Oregon, 227 U.S. 150, 33 S. Ct. 220, 57 L. Ed. 458 (1913), and Johnson v. McDonald,

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[23]The Fifth District Court of Appeal (Northern California), in Save Stanislaus Area Farm Economy v. Board of Supervisors, 13 Cal. App. 4th 141 (1993), has adopted a more restrictive view of pre-election judicial review, Id. at 153, even while recognizing that a city's petition for writ of mandate pre-election might be the proper way to seek pre-election review. Id. at 149. In our view, the decisions discussed above, from the First and Fourth District Courts of Appeal, would be more persuasive to our own division of the Fourth District Court of Appeal.

97 Colo. 324 (1935); Continental Illinois National Bank and Trust Company of Chicago v. State of Washington, 696 F. 2d 692 (9th Cir. 1983). The California Supreme Court has also implicitly recognized that the reach of this prohibition extends to direct action by the people. In Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal. 3d 208 (1978), the petitioner claimed that Article XIIIA (enacted by Proposition 13) impaired certain contractual rights by reducing revenues they had anticipated from taxation. The Supreme Court denied their claim on the grounds no actual impairment had been shown, but observed that a challenge to Article XIIIA on federal impairment of contract grounds might be sustained, based on a party's showing of demonstrable impairment by operation of the initiative. 22 Cal. 3d at 242.

Ruano v. Spellman presents a factual scenario very similar to the instant situation. In Ruano, a multipurpose stadium had been approved by King County voters in an election in 1968, including the issuance of $40 million in general obligation bonds to finance its construction. Thereafter, in 1971 a site was chosen and purchased by the county. An initiative was also commenced in late 1971, seeking to repeal the resolution authorizing the contract and the bonds to finance it, prohibit spending for further development, and direct the repayment of the bonds. The initiative was certified as having sufficient signatures in early 1972. Soon thereafter, a holder of the bonds and a taxpayer sued to prevent the initiative from going on the ballot. 81 Wash. 2d at 821-822. The trial court had enjoined submission of the initiative on three grounds: 1) the acts challenged in 1971 were only administrative acts, not legislative acts, and as such were not subject to the referendum process,[24] 2) the initiative would impair the obligation of contract embodied in the already-issued stadium bonds, and 3) the initiative was in legal effect a referendum prohibited, under these particular circumstances, by the King County charter. The Washington Supreme Court affirmed the judgment of the trial court, based on the first two issues (and not reaching the third).

With respect to the impairment of contracts issue, the Court noted that covenants in the bond documents had led bondholders to rely upon specific revenue streams for repayment, which under the initiative would no longer be made available. 81 Wash. 2d at 826. Further, expert testimony at the trial level had shown that the initiative would have the effect of making the bonds worth less in the market, again frustrating the expectations of those who had purchased the bonds in reliance upon the project and the pledged sources of revenue. Id. Based on the premise that "action, though indirect, which diminishes the value of the contract constitutes a prohibited impairment," the Court held that the submission of the initiative would constitute an impairment due to the encroachment upon the pledged proceeds of the special excise tax and the consequent diminution of the value of the stadium bonds. Id. at 828.

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[24]In this regard the Ruano case is in accord with the line of cases referenced herein discussing the distinction between legislative acts, which may be referended, and administrative or executive acts, which may not. 81 Wash. 2d at 823-825.

In a similar vein, the Ninth Circuit in Continental Illinois held that an initiative, that would have required an election before entering into any contracts for the construction or acquisition of major public energy projects, could not apply to contracts entered into for which bonds had already been issued, as such application would unconstitutionally impair the bond contracts already entered into with respect to those plants. 696 F. 2d at 699-701. In so finding, the Court rejected several asserted justifications, including that the purpose of the initiative had been to respond to cost overruns and to protect the state's finances. Id. at 701-702.

Other courts have also recognized that the initiative power may not be used to impair contracts that have been legitimately entered into prior to the passage of the initiative. For example, in Middletown v. Ferguson, 25 Ohio St. 3d 71 (1986), the Supreme Court of Ohio struck down an initiative ordinance that would have had the effect of impairing contracts already entered into for the construction of certain highway projects. Id. at 78-80. In so finding, the Court observed that "had this initiative been brought . . . before there was an executed contract, and before construction had begun, this controversy likely would not be before us today."[25] Id. at 74. In State ex rel. Frizzell v. Paulsen, 204 Kan. 857 (1970), the Kansas Supreme Court refused to allow a referendum on an urban renewal project where the city had authorized the project and entered into contracts 28 months before the referendum was attempted. Id.

In the present situation, the City entered into its contracts with the Chargers, promising to construct several improvements to the Stadium which at that time were estimated to cost $60 million, in May of 1995. Bonds for the construction were approved in January of 1996 and were sold, after validation through the California Supreme Court, in December of 1996. A construction contract has been awarded. Neither the 1995 Agreement, the bonds sold to finance the improvements promised in that 1995 Agreement, nor the construction contract were timely referended, and as such became binding obligations of the City. To the extent, therefore, that the instant referendum effort would impair those contracts, it constitutes an impermissible impairment of contract in violation of both the state and federal constitutions.

VIII

LEGAL LIABILITIES

As set forth above, if the City Clerk certifies the petitions as sufficient the Council has a mandatory duty to either repeal the Ordinance or place it on the ballot at a special election. The various scenarios which follow from these actions have different legal consequences the Council should be aware of in determining its course of conduct. Preliminarily, we point out that the

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[25]Several years ago the California Court of Appeal applied the converse of this principle to affirm a referendum, in the face of a contract impairment argument, specifically because there was no binding contract yet entered into when the referendum was taken. Harbor Center Land Co. v. City of Richmond, 38 Cal. App. 315, 317 (1918).

proponents have already filed suit claiming that the referendum would cover the entire Stadium expansion, including both the Ordinance (the Chargers Amendments) and the 1995 Agreement. In our opinion this legal position is meritless, and we fully expect the court to rule that the referendum properly covers, if anything at all, only the Ordinance and Chargers Amendments.[26] Further, we have already discussed the Council's option to place the matter on a ballot but file a petition for writ of mandate, seeking court direction as to the substantive and procedural propriety of this referendum. The scenarios discussed below are in addition or in the alternative to these issues, and address potential liabilities on the part of the City to both the Chargers, Nielsen-Dillingham, and bondholders based upon the nature of the action taken by the City, as well as the possible effect on the City's credit rating. Space does not permit us to analyze in detail all the potential liabilities, and the City would have various defenses to any action brought, but the exposure may be significant. We provide the following brief discussion as an overview only.

[26]If the court ruled that referendum was appropriate as to the entire Stadium expansion, including the May, 1995 and January, 1996 ordinances, we would recommend an immediate appeal of such a ruling, in light of the massive costs and exposure associated with the breaches of the contracts approved by those ordinances.

A. Legally Mandated Referendum of the Chargers Amendments

The Chargers Amendments have not yet become effective, as a result of the filing of the referendary petitions. As such, a referendum of the Chargers Amendments would not effect a breach of the Chargers Amendments if it is based solely on a legally mandated referendum, pursuant to the City Clerk's certification of sufficiency. The Chargers and the City would revert to performance under the terms and conditions under the 1995 Agreement.

The Chargers, however, may still contend that the 1995 Agreement may be terminated. Under the 1995 Agreement, the Chargers have the right to approve the plans and specifications for the Stadium improvements, which must incorporate a level of design and quality of materials substantially equal to the design and materials used at the newest and best NFL stadiums in use at the time constructions starts. That standard is different now than when the parties first thought construction would begin (before Henderson initiated his litigation against the Stadium financing), and, while the Chargers and Padres have given their concurrence in the proposed $78 million design, the City may find itself having to meet that new standard with the original, lower estimated cost of $60 million. The Chargers may further have the right to reject new plans and specifications re-drawn to meet the former estimate. Additionally, the City would have to obtain a new concurrence from the Padres as to those revised plans and specifications.

With respect to the Nielsen-Dillingham contract, the court's intervention without the City's concurrence would be considered a valid grounds to suspend the contract, without further liability to the City, until the issue is resolved. If the contract was terminated, the City would have to pay Nielsen-Dillingham a reasonable sum for the work already performed plus a sum representing lost profit. The City may face litigation with Nielsen-Dillingham on those issues.

The City will unlikely face action from the bondholders, as the $60 million issuance will not be affected by a failure to proceed with the additional $18 million in improvements called for in the Chargers Amendments. The City's ability to pay debt service on the $60 million does not depend on revenue gained pursuant to the Chargers Amendments. The City's credit rating may be affected, however, if the rating agencies perceive a failure of the City to stand by its commitments, resulting in increased costs to the City for future bond issuances.

B. Voluntary but Binding Initiative on the Chargers Amendments

If the Clerk certifies the insufficiency of the petitions, the City Council may still voluntarily place the Chargers Amendments to a binding vote, pursuant to the Initiative power. The City, however, may be subject to suit by the Chargers on the grounds that the City has capitulated to the referendum proponents in spite of the fact that the proponents' referendum was not certified,

or is procedurally and/or substantively invalid. The Chargers may claim breach of both the 1995 Agreement and the Chargers Amendments.[27]

The City's position with Nielsen-Dillingham will be substantially the same as set forth above, as will be the City's position with bondholders.

C. Legally Mandated Referendum on the Chargers Amendments and the 1995 Agreement

If the City is legally required to undertake a referendum on both the Charger Amendments and the 1995 Agreement, and those agreements are not approved, the City potentially faces litigation from a variety of sources: the Chargers for breach of contract; Nielsen-Dillingham for the same; and the bondholders for breach of contract and Security and Exchange Commission ("SEC") violations. In addition, the City's credit rating will most likely suffer, as a result of the market's perception that the City will have a debt service obligation for a minimum of ten (10) years with no corresponding revenue. This circumstance will affect the City's ability to pay for other bonds.

D. Voluntary but Binding Initiative on the Chargers Amendments and the 1995 Agreement

Voluntarily agreeing to place the entire expansion effort, including the 1995 Agreement and the Chargers Amendments, to a binding vote exposes the City to extensive liability for breach of contract by both the Chargers and Nielsen-Dillingham. Such an action would effectively concede the issue of the referendability of the original 1995 Agreement, and both the Chargers and Nielsen-Dillingham could argue that because this is not a legally tenable position, the City's concession to the referendum proponents is unnecessary, not legally excusable and a breach of the agreements between the parties. Further, any abrogation of the 1995 Agreement leaves the earlier, 1983 agreement between the City and the Chargers in effect, under which the Chargers: 1) have no obligation to remain in San Diego after 2003; 2) will pay approximately $2.8 million less per year in rent than under the 1995 Agreement; and, 3) have no obligation to compensate the City for any of its expenses (including repayment of the bond proceeds) incurred in reliance on the 1995 Agreement.

Moreover, submitting the original expansion plans to the voters would be a breach of the covenant the City has entered into with the purchasers of the $60 million bond issue, because those bond documents affirmatively represent that the Stadium will be expanded and improved, and that revenues from the expanded Stadium will be available to repay the bonds. Placing that

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[27]Unlike the situation in a legally mandated referendum, a voluntary initiative does not suspend the effectiveness of the Chargers Amendments, and they would be effective.

source of repayment in jeopardy would likely constitute a breach of the agreement with the bondholders. Finally, severe adverse consequences to the City's credit ratings are likely to result from a finding that the City breached its agreements with bondholders and others by voluntarily acquiescing to a vote that was not legally required. In addition, the mere fact of a binding referendum--mandated or voluntary--will constitute a material event requiring disclosure to the municipal securities market under Rules 10b-5 and 15c2-12 of the SEC.

E. Advisory Referendum Only

An advisory referendum, on either the Ordinance alone or the entire expansion project, would not necessarily constitute a breach of contract with either the Chargers, Nielsen-Dillingham or the bondholders, to the extent that there is no interruption in the performance of the City's promises under those agreements. However, unless it is clear that the City would not cancel or terminate those contracts after the results of the vote are known, the uncertainty might lead to a lawsuit filed by one of the other parties to the contracts, seeking a determination of their contractual rights in advance of the advisory vote. Moreover, submitting this to an advisory vote may constitute a material event of disclosure under the above-referenced SEC rules, which may again result in an adverse effect upon the City's bond rating, because of the perceived uncertainty as to the City's willingness to abide by its contractual obligations.

CONCLUSION

It is our opinion that any and all petitions, seeking to referend Ordinance No. O-18365, should have had the Chargers Amendments attached to them at the time they were circulated for signature. Petitions submitted without the documents attached, or which are shown to have been circulated without the Chargers Amendments attached, are likely to be found by a court to be invalid referendary petitions.

Further, as required by the Municipal Code, a voter who signs a referendary petition must have personally dated his or her signature at the time of signing the petition, and extrinsic evidence may not be used to determine the date of the signature. Additionally, the persons whose signatures appear on the petitions must have been domiciled in the City of San Diego, that is, they must not have come here for a temporary period and then returned to a residence in another jurisdiction, for their signatures to be counted as valid. Circulators likewise must have been qualified registered voters in the City at the time they collected the signatures on their petitions. For the Clerk's Office to invalidate any such signatures, however, the defect must appear on the face of the petition or the registration affidavit, or must be apparent from a conflict between these two documents.

Finally, if the City Clerk determines that the petitions are not in proper form, for any reason, he need not continue with a count of signatures, as the Municipal Code requires the

Clerk's Office to determine the insufficiency of either the number of qualified signatures or the form of the petitions. Both are not necessary.

We recognize that our advice herein may result in the issuance of a notice of insufficiency as to this referendary effort, despite the fact that over 50,000 signatures appear on the petitions. The Court in Board of Supervisors v. Superior Court, 147 Cal. App. 3d 206 (1983) faced a similar dilemma, in a case where the parties had claimed that they were misled as to the nature and meaning of a signature requirement. Acknowledging the emotional pull of an equitable argument that, given the collection of over 50,000 signatures, the measure should go forward, the court ruled that it must nonetheless correctly apply the law, even though it would have the effect of invalidating the petitions. Id. at 216. Similarly, we have not taken our role in this process lightly or without regard for the rights of the electorate. Nevertheless, where procedures are in place to safeguard the integrity of the referendum process for the benefit of the entire electorate, those procedures must be followed by those who propose to referend an act.

Respectfully submitted,

CASEY GWINN
City Attorney

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Attachments (8)
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